

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MELISSA ANN WRIGHT, Court Appointed
Guardian of BROGAN ZANE WRIGHT,
KAREN REIGER, and MIKE REIGER,

2:11-CV-01575-LRH-GWF

Plaintiffs,

ORDER

v.

WATKINS AND SHEPARD TRUCKING,
INC., a Montana corporation; GREGORY
ANDREW BRITT, an individual, DOES 1
through 5, and ROES 1 through 5,

Defendants.

Before the court is Plaintiffs Melissa Ann Wright, Court Appointed Guardian of Brogan Zane Wright, Karen Reiger, and Mike Reiger's (collectively "Plaintiffs") Motion to Allow Documents Regarding Plaintiff Brogan Wright's Recent Termination from Employment to Be Utilized at Trial and Allow Witness Identified Regarding Termination of Employment to Testify at Trial. ECF No. 161.¹ Defendants Gregory Andrew Britt and Watkins and Shepard Trucking, Inc. (collectively "Defendants") filed an Opposition (ECF No. 163), to which Plaintiffs replied (ECF No. 164).

I. Facts and Procedural History

This action is currently set for trial on June 6, 2016. Brogan Wright was employed through Opportunity Village as a bathroom attendant at McCarran International Airport from March 26, 2014 to June of 2015. On April 21, 2016, Plaintiffs served a subpoena duces tecum

¹ Refers to the Court's docket number.

1 on Opportunity Village and obtained Brogan Wright's employment file. That same day, they
2 emailed Brogan Wright's employment file to Defendants. On April 25, 2016 Plaintiffs provided
3 Defendants with a Rule 26 Supplement identifying four new witnesses. Then on May 13, 2016,
4 three weeks after providing Defendants with the Rule 26 supplement, Plaintiffs filed the present
5 motion to allow documents regarding Brogan Wright's recent termination from employment to
6 be utilized at trial and allow witness identified regarding termination of employment to testify at
7 trial. ECF No. 161. Defendants responded on May 23, 2016. ECF No. 163. Plaintiffs filed a
8 reply on May 24, 2016. ECF No. 164.

9 **II. Legal Standard**

10 As Plaintiffs disclosed their new witnesses in a Rule 26 Supplement, the question then
11 turns to whether or not the court should modify the pretrial order to allow the newly identified
12 witnesses to testify. "The court may modify the order issued after a final pretrial conference
13 only to prevent manifest injustice." Fed. R. Civ. P. 16. Moreover, the Court's Local Rules state
14 that "no witnesses shall be permitted to testify at the trial unless listed in the pretrial order.
15 However, for good cause shown, the Court may allow an exception to this provision." LR 16-
16 3(d). The decision whether a witness not named in the pretrial order may testify is a "matter[]
17 peculiarly within the trial court's discretion." *Forro Precision, Inc. v. International Bus.*
18 *Machines Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982), cert. denied, 471 U.S. 1130, 105 S.Ct.
19 2664, 86 L.Ed.2d 280 (1985).

20 **III. Discussion**

21 Under Rule 16(e), "[t]he court may modify the order issued after a final pretrial
22 conference only to prevent manifest injustice." Fed. R. Civ. P. 16(e); *Byrd v. Guess*, 137 F.3d
23 1126, 1132 (9th Cir. 1998). "In evaluating a motion to amend a pretrial order a district court
24 should consider four factors: (1) the degree of prejudice or surprise to the defendant[] if the
25 order is modified; (2) the ability of defendant[] to cure the prejudice; (3) any impact of
26 modification on the orderly and efficient conduct of the trial; and (4) any willfulness or bad faith
27 by the party seeking modification." *Galdamez v. Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005)
28 (citing *Byrd*, 137 F.3d at 1132). After considering these factors, if "the court determines that

1 refusal to allow a modification might result in injustice while allowance would cause no
2 substantial injury to the opponent and no more than slight inconvenience to the court, a
3 modification should ordinarily be allowed.” *United States v. First Nat’l Bank of Circle*, 652 F.2d
4 882, 887 (9th Cir.1981). The trial judge may exclude evidence not identified in accordance with
5 the pretrial order when the party seeking to introduce the evidence offers no justification for
6 delay. *Colvin v. United States*, 549 F.2d 1338, 1340 (9th Cir.1977). In such a case, “[a]ny
7 injustice resulting from exclusion ... comes from [the defaulting party’s] own failure properly to
8 present his case.” *Id.*

9 Here, the degree of prejudice to the Defendants is simply too high to justify amending the
10 pretrial order. Brogan Wright’s employment ended in June of 2015, but Plaintiffs did not
11 identify their new witnesses until more than ten months later and nine months after the issuance
12 of the joint pretrial order on July 10, 2015. Plaintiff’s counsel only sought to obtain updated
13 information on Brogan Wright in 2016, more than six months after his employment ended.
14 Plaintiffs then filed their motion to allow the witnesses to testify mere weeks before the trial is
15 set to begin. It would be prejudicial to expect Defendants to depose the four new witnesses in
16 the brief time before trial while also preparing for trial or for them to go into the trial not
17 knowing the prospective testimony of these witnesses. Further, the potential effect on
18 Defendants’ trial strategy at this late date, after relying on the witness list contained in the
19 pretrial order for nearly a year, and the possibility that, as a result of the testimony of these
20 witnesses, the Defendants “may need further discovery for rebuttal evidence, thereby resulting in
21 prolonging the proceedings” further weighs against granting this motion. *Eberle v. Town of*
22 *Southampton*, 305 F.R.D. 32, 36 (E.D.N.Y. 2015). Additionally, Plaintiffs provide no
23 justification for the delay in obtaining this evidence. As the Ninth Circuit has repeatedly noted,
24 any injustice resulting from such an exclusion comes from the party’s own failure to properly
25 present his case. *See, e.g., Delta Sys., Inc. v. TRW*, 874 F.2d 815 (9th Cir. 1989); *United States v.*
26 *Lummi Indian Tribe*, 841 F.2d 317, 320 (9th Cir.1988); *Colvin*, 549 F.2d at 1340. Finally, the
27 additional four witnesses have not been identified to this Court. Moreover, it is likely that
28

1 previously identified witnesses will be able to offer some relevant testimony concerning the
2 employment issue. For these reasons, Plaintiffs' motion is denied.

3 **IV. Conclusion**

4 IT IS THEREFORE ORDERED that Plaintiffs' Motion to Allow Documents Regarding
5 Plaintiff Brogan Wright's Recent Termination from Employment to Be Utilized at Trial and
6 Allow Witness Identified Regarding Termination of Employment to Testify at Trial (ECF No.
7 161) is DENIED.

8 IT IS SO ORDERED.

9 DATED this 31st day of May, 2016.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE